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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VINCENT FLOYD RUSSO, Defendant and Appellant.	G051850 (Super. Ct. No. 14CF1924) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard J. Oberholzer, Judge. (Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI, § of the Cal. Const.) Affirmed.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

In this case we are called on to decide whether the trial court erred in denying appellant's request to withdraw his guilty plea. Appellant contends the request should have been granted because the trial court never addressed a *Marsden* motion he had made to replace his court appointed attorney. (See *People v. Marsden* (1970) 2 Cal.3d 118.) Like the trial court, we find appellant abandoned his *Marsden* motion by failing to bring it up or raise any complaints about his attorney at the time he pleaded guilty. We therefore affirm the judgment.

PROCEDURAL BACKGROUND

In June 2014, appellant was charged with rape, assault with the intent to commit rape, assault with force likely to cause great bodily injury, and false imprisonment. A prior strike allegation, based on a burglary conviction appellant suffered in 1982, was also alleged. After entering a plea of not guilty, appellant was remanded to custody, where he remained throughout all subsequent proceedings.

On June 19, appellant appeared for a pretrial hearing with his court appointed attorney Jacqueline Freeman. At the hearing, appellant waived time, and Judge Elizabeth Macias set his preliminary hearing for August 22. With appellant's consent, the hearing was subsequently continued until October 17.

On September 15, appellant filed a handwritten letter that was addressed to Judge Macias. In the letter, appellant requested a *Marsden* hearing so he could get another attorney. He claimed Freeman was not working in his best interests, and despite his numerous requests, she had not given him any information about the DNA evidence in his case. As proof of this, appellant attached a copy of a letter he had allegedly sent to Freeman in which he requested various discovery items from her. Appellant also claimed he was innocent of the charges and would win the case if he had a "real defense attorney" to represent him. He ended the letter by saying he was "not good speaking in open court."

Appellant followed up his letter to Judge Macias by filing two additional *Marsden* motions in which he alleged Freeman was not representing him effectively. For the sake of clarity, we will refer to these motions and appellant's letter to Judge Macias collectively as his *Marsden* motion.

On September 29, Judge Macias reviewed the motion in chambers without counsel present and ordered copies of the motion to be sent to Freeman. No further action was taken at that time. In fact, nothing further happened on the case until October 17, which is when appellant's preliminary hearing was scheduled to be heard. On that day, the parties were prepared to go forward with the hearing. However, the hearing never took place because over the course of the morning the parties worked out a plea agreement that resulted in appellant pleading guilty that very afternoon.

The plea hearing was conducted by Judge Richard J. Oberholzer, who was making his first appearance on the case and wholly unaware of appellant's *Marsden* motion. At the start of the hearing, Freeman provided Judge Oberholzer with appellant's plea agreement, which was memorialized on a form entitled "Advisement and Waiver of Rights for a Felony Guilty Plea." As reflected in the form, the parties agreed appellant would plead guilty to the charges of rape and assault with force likely to cause great bodily injury and also admit the prior strike allegation. In return, the prosecution would dismiss the remaining charges, and appellant would be sentenced to six years in prison.

Among the provisions of the plea form appellant initialed before signing it was paragraph no. 28. That provision states, "I offer my plea of guilty freely and voluntarily, and with full understanding of all matters set forth in the accusatory pleading and this [plea] form. No one has made any threats or used any force against me, my family, or anyone else I know, in order to convince me to plead guilty in this case. Further, all promises that have been made to me to convince me to plead guilty are on this . . . form."

Appellant also initialed paragraph no. 30, which states, "I understand each and every one of the rights set forth above in this [plea] form. I waive and give up each of those rights in order to enter my guilty plea. I am entering a guilty plea because I am in fact guilty and for no other reason."

Appellant's plea form also contains a signed statement from defense counsel. The statement attests Freeman discussed the charges, facts, defenses and possible sentence ranges with appellant, and that she also explained the contents of the plea form with him. The statement further provides Freeman concurred in appellant's decision to plead guilty, and the plea form may act as evidence of appellant's advisement and voluntary waiver of the rights set forth in the form.

At the plea hearing, Judge Oberholzer went over the plea form with appellant. Appellant confirmed he was knowingly waiving his rights as reflected on the form and had discussed the consequences of his plea with Freeman. He also said he was entering his plea voluntarily, free of any threats or coercion. However, when the court asked him how he wished to plead to the substantive charges, he answered, "Guilty, I guess." The court told him, "It's not you guess. You either plead guilty or not guilty." Appellant replied, "Okay. Guilty."

The court then asked appellant if he wanted to admit the prior strike allegation. Appellant responded, "That I had a burglary? Yes." At that point, the prosecutor interjected, "I'd like to state for the record that was a residential burglary." Appellant disagreed, saying, "No, that wasn't a residential." Freeman then asked to have a moment with appellant off the record. Following their discussion, the court reasked appellant if he wanted to admit the prior strike allegation, and he said yes. Satisfied that appellant knowingly and intelligently waived his rights and understood the consequences of his plea, the court accepted his guilty plea.

Sentencing was set for November 21, 2014. On that date, retained counsel Christian Jensen substituted in as appellant's attorney, and sentencing was continued until

March 20, 2015. A week before then, Jensen filed a motion to withdraw appellant's guilty plea on the grounds he was never afforded a *Marsden* hearing, and he was unable to exercise his free judgment when entering his plea due to his poor relationship with Freeman. The thrust of the motion was that appellant's relationship with Freeman had broken down to such a degree that appellant could not have been meaningfully advised by her at the time he pleaded guilty. The People disagreed. In their opposition papers, they surmised the evidence would show appellant voluntarily decided to forego his *Marsden* motion after he and Freeman worked out their differences.

At the motion hearing, Judge Oberholzer heard testimony from both Freeman and appellant. Freeman testified that even before she received a copy of appellant's *Marsden* motion, she knew he was not entirely pleased with how she was handling his case. As Freeman described it, she and appellant had a "fluctuating relationship . . . . There were times where he was upset with [her] representation . . . [and t]here were times where he seemed pleasant and okay with it." Freeman spoke to appellant several times about his desire to get another attorney. "But, ultimately, those conversations would end without us going that route." According to Freeman, the case unfolded in such a way that appellant began to trust her more, and the *Marsden* issue effectively "resolv[ed] itself."

Speaking to events on the day of the plea hearing, Freeman testified appellant never said anything about his *Marsden* motion or wanting another attorney, nor did she ask him about that issue. Instead, they were focused on the plea bargain that was being offered by the prosecution. The offer was for one day only, and the prosecutor made it clear to Freeman that if the People had to go through with the preliminary hearing, the offer would increase substantially in terms of appellant's prison exposure. Freeman knew appellant was looking at a maximum prison term of 28 years. Because the prosecution was offering a six-year lid, she thought the offer was a good deal for appellant and encouraged him to accept it.

Freeman testified she and appellant talked extensively about the plea bargain. Their discussions were fruitful, and appellant was generally receptive to the offer. However, there was one issue they got hung up on, so Freeman had another attorney in her office come in and speak to appellant about it, and they were able to get it resolved. After that, Freeman felt appellant was on board with the deal and okay with her representing him. Even though their relationship was not "warm and fuzzy," Freeman believed she was able to effectively communicate with appellant and properly advise him regarding the consequences of his guilty plea. Indeed, she felt she was always able to act in appellant's best interests and ultimately obtained a good result for him.

Appellant had a different take on the situation. He testified he never felt the need to talk to Freeman about his *Marsden* motion because she already knew he was dissatisfied with her, and he had filed the motion directly with the court. Appellant believed the court would see to it that his *Marsden* motion was heard. He was expecting the motion to be heard on the day of his preliminary hearing, but when he arrived at court that day, everyone was focused on the possibility of a plea agreement. In fact, Freeman was adamant about him taking the prosecution's offer. Even though he had questions about the prior strike allegation and did not want to take the offer, Freeman pressured him to do so. According to appellant, he even tried to voice his objection to the plea agreement in open court. However, Freeman "shushed" him and told him to keep quiet, so he begrudgingly accepted the deal.

Asked why he did not renew his *Marsden* motion at any time during the plea process, appellant testified, "As soon as I came into the courtroom, [Freeman] bombarded me with this plea deal. I had no time to do nothing." Appellant also claimed he was intimated by Freeman and uncomfortable expressing himself in court. Appellant insisted he had no desire to withdraw his request for a *Marsden* hearing. To the contrary, he was hoping the court would grant him a hearing to voice his complaints about Freeman.

The trial court did not believe appellant's subjective intentions were controlling. It also questioned whether appellant was the shrinking violet he made himself out to be, given how well he was able to articulate himself at the motion hearing. While recognizing appellant did file a *Marsden* motion, the court found it significant that he continued to work with Freeman up until the time of the plea hearing. And even then, he voiced no concerns about Freeman, despite having ample opportunity to do so. Under these circumstances, the court found appellant impliedly withdrew his *Marsden* motion. It therefore denied his motion to withdraw his plea and sentenced him to six years in prison pursuant to the terms of his plea agreement.

DISCUSSION

Appellant contends the trial court erred in denying his request to withdraw his guilty plea, but we agree with the court's determination that appellant effectively abandoned his *Marsden* motion and voluntarily entered his guilty plea.

Before taking up the abandonment issue, there are two preliminary issues to address. The first is whether appellant made a legally sufficient request for a *Marsden* hearing. Respondent argues appellant's court filings were insufficient in this regard because they amounted to "mere grumbling" about Freeman. (See *People v. Sanchez* (2011) 53 Cal.4th 80, 90 [defendant seeking *Marsden* hearing must clearly signal he wants another attorney].) In so arguing, respondent relies on language that appears in a letter appellant sent to Freeman. That letter, which was attached to the letter appellant sent Judge Macias, does indicate appellant was willing to work with Freeman if she cooperated with his request for discovery materials. However, the letter also shows appellant's frustration with Freeman's failure to provide those materials in response to his previous requests. Moreover, irrespective of the letter, appellant subsequently filed two separate motions in which he specifically requested a *Marsden* hearing based on Freeman's alleged failure to represent him in a competent manner. We believe appellant sufficiently apprised the court of his desire for a new attorney.

The second preliminary issue is whether appellant waived his right to appeal by signing paragraph no. 15 of his plea form, which states: "I understand I have the right to appeal from decisions and orders of the Superior Court. I waive and give up my right to appeal from any and all decisions and orders made in my case . . . . I waive and give up my right to appeal from my guilty plea. I waive and give up my right to appeal from any legally authorized sentence the court imposes which is within the terms and limits of this plea agreement." Such waivers are generally enforceable. (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.) But they do not apply when, as here, the defendant alleges he received ineffective assistance of counsel in connection with the plea process itself. (*People v. Orozco* (2010) 180 Cal.App.4th 1279, 1285.) Therefore, we will address the merits of appellant's appeal.

The general rule respecting *Marsden* motions is that when the defendant requests the discharge of appointed counsel, he has the right to a hearing to express his grievances with his attorney. (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.) However, as our Supreme Court has recognized, in the hectic course of trial proceedings """many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them."""" (*People v. Braxton* (2004) 34 Cal.4th 798, 814.) Consequently, "a party may not challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicating that the error or omission probably was inadvertent." (*Id*. at pp. 813-814.)

This abandonment principle has been applied in a variety of contexts, including the situation where the defendant fails to follow up on his request for a *Marsden* hearing. For example, in *People v. Jones* (2012) 210 Cal.App.4th 355 (*Jones*), the defendant filed a *Marsden* motion before trial but "never again brought the matter to the trial court's attention despite having been present in court a dozen times before his

trial began." (*Id*. at p. 362.) *Jones* ruled the defendant "had the duty of bringing his motion to the trial court's attention at a time when the oversight could have been rectified," and his failure to do so amounted to an abandonment of his *Marsden* claim. (*Ibid*.; accord *People v. Vera* (2004) 122 Cal.App.4th 970, 980-982 [abandonment theory applied where the defendant failed to take up the trial court's invitation for him to renew his *Marsden* motion]; cf. *People v. Skaggs* (1996) 44 Cal.App.4th 1, 7-8 [defendant abandoned purported request for self-representation by failing to raise it in subsequent proceedings and silently acquiescing to representation by appointed counsel].)

Here, unlike *Jones*, appellant only appeared in court once, not 12 times, after filing his *Marsden* motion. However, that single court appearance – appellant's plea hearing – was obviously a momentous event in his case. In fact, by pleading guilty, appellant must have known his case, as well as his opportunity to voice concerns about his attorney, was coming to an end. Appellant claims he was blindsided by the plea proceedings, but his plea did not materialize until after a full morning of negotiations with the prosecution. He thus had plenty of time to contemplate what was going on. In addition, appellant's plea form reflects he knowingly and voluntarily pleaded guilty to the charges, and at the plea hearing the trial court went over the form with appellant to ensure that was the case. At no time did appellant indicate he was disgruntled about the way Freeman was or had been representing him.

Appellant asserts his failure to complain was attributable to his shyness and Freeman's intimidating manner. However, during his plea hearing, appellant had no problem interrupting the proceedings to voice disagreement with the prosecution's characterization of his prior conviction as a residential burglary. Moreover, at the later hearing on his motion to withdraw his plea, appellant criticized Freeman in lengthy detail from the witness stand. This led the trial court to surmise appellant had the ability to speak up and renew his *Marsden* request at the plea hearing if he was still dissatisfied

with Freeman, and we see no reason to question that conclusion. Considering all of the circumstances surrounding this issue, we discern no basis for reversal.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.